FIFTH REPORT

of

THE NORTHERN TERRITORY LAW REVIEW COMMITTEE

RELATING TO THE QUESTION OF UNFITNESS TO PLEAD

DARWIN

JUNE 1980

REPORT AND RECOMMENDATION OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE - RELATING TO THE QUESTION OF UNFITNESS TO PLEAD

To: The Honourable P.A.E. Everingham,
Attorney-General for the Northern Territory of Australia.

Dear Mr Attorney,

Arising out of earlier consideration of this matter and the enactment of the Criminal Law Consolidation Act 1981, the annexed Report has been completed by this Committee for consideration by your goodself and the Department of Law.

UNFITNESS TO PLEAD

SECTION 382A CRIMINAL LAW CONSOLIDATION ACT

Pioch v Lauder (1976) 27 F.L.R. 79 highlighted critical problems in relation to the area of unfitness to plead, which required urgent legislative reform. A copy of the judgment is annexed hereto.

It will be recalled that Lauder was charged with a simple offence before a stipendiary magistrate, but was unable to enter a plea. The stipendiary magistrate stated a special case pursuant to Section 162 Justices Act in which the following facts, inter alia, were proved:

1. Lauder was totally deaf and unable to use speech to communicate.

2. There was no evidence that Lauder was mentally incapable.

3. Lauder had not absorbed Aboriginal or European cultural or moral values.

In Part IV of the case stated, the magistrate found that Lauder was unable to understand the nature of the charge or proceedings, unable to make a Defence, and in effect, unable to plead. The case stated was heard by Forster J. (as he then was) in the Supreme Court of the Northern Territory.

It was agreed that, notwithstanding the fact that he was not mentally incapacitated, Lauder should be treated as if he were insane (27 F.L.R. 79, 84) - a "bizarre and ... offensive result". As Forster J. pointed out (pages 84-85), had Lauder been charged with an indictable offence, the magistrate could continue with the committal hearing as no plea is required in such proceedings, and if appropriate commit Lauder for trail. Upon indictment, a special jury would

then be empanelled to decide the issue of fitness to plead, and if Lauder was found unfit to plead, he would be committed to custody until the pleasure of the Governor-General be known. Forster J. though, continued:

> "In the case of simple offence, however, there appears to be neither authority nor statutory provision to deal with the matter of a defendant who is insane, whether properly so called as being a person suffering from a sufficient defect of reason, or disease of the mind, or a person like the defendant here. Of course, if the defendant to a charge of simple offence appears to a magistrate to fall within the provisions of the Mental Defectives Ordinance 1940-1969, his case may, so to speak, be disposed of by his being dealt with under that Ordinance. However, the defendant in this case is not a mental defective as defined. The researches of counsel and my own researches have failed to find any authority either in text-books or reports which helps with the problem. ...
>
> What then is the learned stipendiary magistrate to do in this case? It is clear that the defendant is not fit to plead and should be treated as though he were insane which he is not. No authority exists for the learned stipendiary magistrate to order the defendant's detention to await the pleasure of the Governor General and yet plainly, it seems to me, it would not be proper to proceed with his summary trial."

Given this situation, there was no option but to release Lauder.

The two problems evident from Lauder were these:

1) The manifest injustice of treating a person unfit to plead by reason of physical incapacity only as insane; and

2) That a Court of summary jurisdiction had no power to

deal with a person who was unfit to plead.

Section 382A was designed to correct the situation.

Section 382A must be viewed in its context. The prime purpose of the section is to give Courts and particularly the Supreme Court additional powers to deal with persons found unfit to plead. It will be recalled that under the "old" (i.e. now repealed) Section 382 a person found unfit to plead, for whatever reason, was confined until the Governor-General's pleasure be known, and the Supreme Court had no discretion in this matter. The added injustice here was that the person whose fitness to plead was in question could well be found unfit to plead, and incarcerated, notwithstanding the fact he may not have been guilty of the offence. Section 382(3) gave the Supreme Court wide powers and discretions to deal with a person found unfit to plead in the most appropriate and just manner, thus eliminating the injustice of the old system. At this point, it may be worth noting that, as far as the writer can ascertain, Section 382A is a completely novel approach to a problem never before satisfactorily dealt with.

Looking at Section 382A itself, Sub-section (1) corrects the main problem found in Lauder in that S.382A(1) now permits any court before whom a person is charged (whether a court of summary jurisdiction or the Supreme Court) to consider where appropriate, the question of fitness to plead. The Section makes no reference as to who may raise the issue, nor as to the onus or burden of proof, so the principles in this respect established in Podola [1959] 3 ALL ER 418 and McCarthy [1967] 1 Q.B. 68 still operate, namely that the issue of fitness to plead may be raised by the judge, prosecution or defence (see generally Poole, "Standing Mute and Fitness to Plead" [1968] Crim. L.R. 6).

Section 382A(1) does, however, depart from the previous practice in that it is now the judge who must decide on all the evidence presented whether the accused is fit to plead, and not the jury. This is clearly a desirable innovation, as it

puts a difficult decision into the hands of the person best able to deal with it, rather than run the lottery of a jury decision in which the jury may well have got lost in a maze of technicalities. A vital point though must be noted - the section transfers all the powers of the jury to the Court. Just as a jury could find a person fit to plead, or unfit to plead, so too can the court before whom the accused is charged find that person unfit to plead or fit to plead. This applies where the Court concerned is a Court of Summary jurisdiction or the Supreme Court. It is submitted that when Muirhead J. found Lauder FIT TO PLEAD in the latest Lauder case (24 April 1980) he was quite clearly acting within the scope of his powers under Section 382A.

As regards the criteria for unfitness to plead, the test adopted by Section 382A is that the accused must suffer "from want of comprehension of the nature of the circumstances alleged or of the proceedings". In my submission this test is substantially the same as the test that has consistently been used by the Courts in assessing fitness to plead (see Dashwood [1942] 2 ALLER 586, Presser [1958] VR 45 and Podola). The situations envisaged by the cases cited as rendering a person unfit to plead will clearly be encompassed by the test in Section 382A - after all, a person who cannot comprehend the nature of the circumstances alleged or of the proceedings will hardly be able to "instruct" counsel or otherwise defend himself. Section 382A, again, in this respect, must be viewed in its context. The purpose here is to abolish the stigma of insanity found in the previous provisions, which attached to a finding of unfitness to plead - and with it the draconian consequences of such a finding. Hence the 'neutral' terminology, and I suggest the Section is entirely successful in this respect.

Where a person is found unfit to plead, the court before whom he is charged, again be it a court of summary jurisdiction, or the Supreme Court, may order that the person be discharged, remanded on bail or remanded in custody. By S.382A(2), where a magistrate remands a person on bail or in custody pursuant to

S.382A(1), then the person so remanded shall be remanded to appear before the Supreme Court. S.382A(3) gives the Supreme Court a wide discretion as to the treatment of offenders remanded pursuant to S.382A(2). The powers given to the Supreme Court in S.382A(3) are to discharge absolutely, to release conditionally or to detain in safe custody (in such place, for such periods and subject to such conditions) as the Supreme Court thinks fit. It is submitted that the powers contained in S.382A(3) are absolutely necessary to allow the Supreme Court to take such steps as are in the interests of the person concerned and of justice generally.

Section 382A(4) - (6) allows the persons found unfit to plead and dealt with under Section 382A(1)(c), (3)(b) and (3)(c) to apply to the Supreme Court for a variation of the original order along the lines found in S.382A(4) - (6), and section 382A(7) allows the Supreme Court to make such order as it thinks fit in respect of an application under S.382A(4) - (6).

Finally, S.382A(8) permits the Supreme Court to order at any time that a person in respect of whom an order has been made under S.382A(3)(b) and (c), be tried for the offence for which he was found unfit to plead under S.382A(1).

Having outlined the scope of Section 382A, it is possible to note one problem in respect of the powers of the Supreme Court under Section 382A(3). S.382A(3) gives the Court appropriately wide powers, but only in the case where a magistrate (before whom the person found unfit to plead was charged) remands the person under S.382A(1) (b) and (c). S.382A(3) therefore does not cover the situation where the Magistrate has committed a person for trial before the Supreme Court (the Magistrate in this case does not sit as a court but as an investigatory tribunal - see Pioch v Lauder and R v West [1964] 1.Q.B. 15 - and is therefore not a court before whom a person is charged). Thus, a person committed to the Supreme Court for trial on an indictable offence not triable summarily will only be charged before the Supreme Court and in this situation the Supreme Court will only have the powers under Section 382A(1). In short, the Supreme Court has, wider discretion in the treatment of a person found unfit to plead

where that person is charged before a magistrate then when such a person is charged before the Supreme Court. Following from this, it will be noted that the Supreme Courts powers under S.382A(8) are restricted to the current position under S382A(3)(b) and (c).

This problem has been considered by the Department of Law, and it will be recommended that Section 382A(3) be amended as soon as is practicable to remove the problem. The suggested amendment will affect only the first two lines of S.382A(3) which will after amendment, read (subject to the draftsman's expert opinion) in a similar way to the following:

S.382A(3)

The Supreme Court may order that a person indicted [or charged] before it or remanded under sub-section (2) to appear before it be -
[to follow existing S.382A(3) without change]

Such an amendment to S.382A(3) will alleviate any need to amend S.382A(8).

SUMMARY

1. Section 382A provides a novel, successful and workable solution to a problem no other jurisdiction has adequately tackled.

2. Amongst other innovations, section 382A transfers to a judge alone all the functions of a jury empanelled to decide the issue of fitness to plead, including the powers to find a person unfit to plead or fit to plead.

3. The Section removes the stigma of "insanity" traditionally attached to a finding of unfitness to plead, and gives to the Supreme Court the powers and discretions necessary to properly deal with persons found unfit to plead in the most appropriate manner.

4. Section 382A(3) is restrictive in that it does not extend the powers in that sub-section to a Supreme Court hearing the case of a person charged before it after a committal hearing. However, S.382A(3) will be amended as suggested to correct this situation.

RECOMMENDATION

That subject to amendment of Section 382A(3) as suggested, Section 382A is an effective piece of legislation, providing a workable solution to a difficult problem. It should continue in operation.

IN THE SUPREME COURT OF THE

NORTHERN TERRITORY OF AUSTRALIA

No. 350 of 1976

In the matter of -

AN INFORMATION LAID BY IAN EDWARD PIOCH AGAINST SYDNEY LAUDER IN THE COURT OF SUMMARY JURISDICTION AT ALICE SPRINGS

And in the matter of -

A SPECIAL CASE STATED UNDER SECTION 162 OF THE JUSTICES ORDINANCE 1928-1976

REASONS FOR JUDGMENT
(delivered 3 September 1976)

FORSTER J. :

This is a Special Case Stated pursuant to section 162 of the Justices Ordinance 1928-1976 by a Court of Summary Jurisdiction constituted by a Stipendiary Magistrate sitting at Alice Springs. I set out the Special Case in full.

> "I. The abovenamed informant laid an information against the abovenamed defendant for that the said defendant did on the 26th day of May, 1976 at Tennant Creek, in the Northern Territory of Australia, did assault Elaine Baker in circumstances of aggravation.
>
> II. The said information came on for hearing before me on the 21st and the 23rd day of June, 1976, and in Alice Springs on the 8th day of July 1976, and the result of such hearing was as follows:

III. At the said hearing the following acts were either proved, or admitted by the parties: facts

(1) The defendant is totally deaf from birth and is unable to use speech to communicate.

(2) The defendant is a full blood Aboriginal man brought up in a tribal Aboriginal community.

(3) The defendant has not absorbed the cultural or moral values of Aboriginal or tribal society.

(4) That the defendant has not absorbed the cultural or moral values of European Society.

(5) That the defendant is of average or above average intelligence, with no evidence of any mental incapacity.

IV. Upon these facts I found that by virtue of his incapacity

(i) The defendant is unable to understand the nature of a charge or of the particular charges against him.

(ii) The defendant is not able to plead to the charge.

(iii) He does not understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with.

(iv) The defendant is unable to follow the course of proceedings so as to understand what is going on in Court in a general sense.

(v) The defendant is unable to understand the substantial effect of any evidence that may be given against him.

(vi) The defendant is unable to make his defence or answer to the charge.

(vii) The defendant is unable to give instructions to his counsel and is unable to give evidence to Court.

(viii) The defendant is without the information necessary to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the Court and to his counsel.

V. I was of opinion that important questions of law have arisen out of the hearing which in my discretion were respectfully reserved for the consideration of the Honourable Supreme Court.

VI. The question of law upon which this case is stated for the opinion of the Supreme Court is whether to proceed in the circumstances would be

(a) contrary to law

(b) in excess of the jurisdiction of the Court

(c) a denial of natural justice, or

(d) improper in the circumstances,

and further, if this Court should not proceed, what powers has this Court in relation to the defendant.

VII. For the information of the Supreme Court, a copy of the evidence taken upon the hearing of the said information is attached hereto."

At the outset it should be observed that although the charge of assault accompanied by circumstances of aggravation appears on a document entitled "Information", and an Information is the appropriate document for laying a charge of an indictable offence, the learned Magistrate started the proceedings by asking

for a plea from counsel for the defendant. This procedure is wholly inappropriate where the charge is one of an indictable offence but appropriate if the charge is one of a simple offence. It becomes of critical importance to the answering of the Special Case Stated to determine whether a charge of assault accompanied by circumstances of aggravation is a simple offence or an indictable offence. If it be a simple offence, I consider that entitling the charging document "Information" is a nullity and the appropriate procedure for the Magistrate to follow was that for a simple offence, which indeed was what he appears to have done at the commencement of the proceedings at least, although later in the hearing he stated that it was an indictable offence. If it was so, of course, the appropriate procedure was the administrative hearing of the evidence and determination whether or not a prima facie case was made out by the prosecution and, after such determination, the learned Magistrate could have, so to speak, reverted to the status of a Court and proceeded to deal with the charge as a minor indictable offence or he could have committed the defendant for trial in the Supreme Court. When the learned Stipendiary Magistrate decided that there was a prima facie case made out and that he would deal with it himself then that was the

appropriate time to ask for a plea.

Simple offence is defined in section 4 of the Justices Ordinance as follows - "Means offence or act for which a person is liable by law, upon summary conviction before a Justice or Justices, to be imprisoned or fined or both or to be otherwise punished; but does not include an indictable offence which can only be heard and determined in a summary way as a minor indictable offence."

Sections 131A to 131E of the Justices Ordinance are as follows:-

> "131A. The provisions of the next four succeeding sections apply notwithstanding the preceding sections of this Division.
>
> 131B.-(1.) Subject to section one hundred and thirty-one E of this Ordinance, a Court of Summary Jurisdiction shall have jurisdiction to hear and determine in a summary way a charge in respect of a common assault, not being a common assault accompanied by circumstances of aggravation.
>
> (2.) If the defendant is convicted, the Court may adjudge him to be punished by a fine not exceeding Five hundred dollars or imprisonment for a period not exceeding six months.
>
> 131C.-(1.) Subject to section one hundred and thirty-one E of this Ordinance a Court of Summary Jurisdiction constituted by a Stipendiary Magistrate shall have jurisdiction to hear and determine in a summary way a charge in respect of an unlawful assault accompanied by circumstances of aggravation.
>
> (2.) If the defendant is convicted, the Court may adjudge him to be punished by a fine not exceeding

Two thousand dollars or imprisonment for a period not exceeding two years, and may, if it thinks fit, require the offender to enter into a recognizance to keep the peace and be of good behaviour for a period not exceeding six months from the expiration of the sentence.

(3.) A person shall not be punished as for an assault accompanied by circumstances of aggravation within the meaning of this section unless he has been charged with committing such an assault and the circumstances of aggravation have been stated in the charge.

131D.-(1.) In the last two preceding sections, "circumstances of aggravation" includes circumstances that make the assault -

(a) an offence of a sexual nature;

(b) an unlawful assault on a child under the age of seventeen years; or

(c) an unlawful assault on a female.

(2.) In this section, "offence of a sexual nature" includes -

(a) an offence constituted wholly or partly by an act whereby the offender has exhibited a failure to exercise proper control over his sexual instincts; and

(b) an offence so committed that the offender has, in the circumstances associated with the committal, exhibited a failure to exercise proper control over his sexual instincts.

131E. Sections one hundred and thirty-one B and one hundred and thirty-one C of this Ordinance do not authorise a Court of Summary Jurisdiction to deal summarily with a charge of assault -

(a) on which a question arises as to -

(i) the title to land, an estate in land or an interest in or accruing from land

(ii) bankruptcy; or

(iii) the execution of the process of any court of justice; or

(b) where the Court before which the charge is brought -

(i) is of the opinion that the assault complained of was accompanied by an attempt to commit a felony or, where the Court is not constituted by a Stipendiary Magistrate, a misdemeanour; or

(ii) is of the opinion that the charge is a fit subject for prosecution by indictment."

These sections are contained in Division 2 of Part V of the Ordinance which Part deals with indictable offences. Division 2 deals with minor indictable offences. It seems to me that section 131A is effective to remove sections 131B to 131D inclusive from that Division so that they may be read independently of it. Section 131B gives jurisdiction to deal with a common assault as a simple offence. It is, I think, not necessary to decide this but this section seems to me to show that common assault has always been an indictable offence because if it were a simple offence then section 131B would be unnecessary. See also section 48 of the Criminal Law Consolidation Act and Ordinance. I also draw attention to section 54 of the Criminal Law Consolidation Act and Ordinance.

Section 131C creates the offence of "aggravated assault" and except for the cases set out in section 131E the offence is made a simple offence triable summarily. Section 120 sets out the offences otherwise indictable which may be dealt with by a Magistrate, and succeeding sections set out the procedure to be followed if a Magistrate deals with a charge of such an offence. This procedure is detailed and quite clear but section 131A makes the procedure inapplicable to section 131C. If, as Mr. Chow contends, aggravated assault is a minor indictable offence, then there is no procedure laid down for dealing with it as such. If section 131A is to have any effect at all, it must be to make an assault "accompanied by circumstances of aggravation" triable summarily which it would not otherwise be unless the procedure laid down in section 121A et. seq. was followed. A consideration of the Acts Interpretation Act of the Commonwealth leads to the same result. Section 42 of that Act which is made to apply to Northern Territory Ordinances by section 4 of the Interpretation Ordinance is as follows:-

> "42. Offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears, be indictable offences."

The penalty prescribed by section 131C(2) for an assault accompanied by circumstances of aggravation is a fine of Two thousand dollars or imprisonment for two years but it appears that the words of section 131C(1) express a contrary intention in the plainest terms. I note in passing that with respect to a conviction under section 131C the Magistrate may impose a sentence of two years imprisonment whereas if a person is convicted upon information before the Supreme Court for common assault he may be imprisoned for one year only.

I conclude that assault accompanied by circumstances of aggravation is a simple offence and that the learned Stipendiary Magistrate was quite right when he asked for a plea at the outset and wrong when later in the proceedings he said that it was a minor indictable offence. It follows that there should have been a complaint laid rather than an information.

I should perhaps make it clear that although assault accompanied by circumstances of aggravation is usually a simple offence, if any of the circumstances set out in section 131E are present, the offence is a minor indictable one and it should be charged on information. If it is not so charged and if during the course

of the hearing of the complaint it becomes apparent that section 131E applies to the matter then the court should adopt the procedure set out in section 121A et seq. and deal with the matter as a minor indictable offence in the ordinary way notwithstanding that the hearing may have commenced in a manner appropriate to a simple offence.

What then of the defendant and his disabilities? It was argued for the defendant and conceded by the Crown that he should be treated as if he were insane. This rather bizarre and no doubt offensive result seems to follow from the authorities (R. v. Pritchard 1836 173 E.R. 135, R. v. Berry 1876 1 Q.B. 447, R. v. Presser 1958 V.R. 45, R. v. Podola 1960 1 Q.B. 325). If this be right, and it seems clear that it is, what should the learned Stipendiary Magistrate do? If this were an indictable offence he should proceed with the hearing and commit the defendant for trial. I consider that notwithstanding the defendant's disabilities a committal hearing may proceed since no plea is required from him in such proceedings. Upon him being indicted before the Supreme Court a special jury should be empanelled to try the question of the defendant's fitness to plead. If the jury found in accordance with the facts found by the learned Stipendiary Magistrate and set out in the

Special Case then this Court would have no option but to apply the provisions of section 20B of the Crimes Act, made to apply to the offence created by section 131C by section 4 of the Interpretation Ordinance, and commit the defendant to be kept in custody until the pleasure of the Governor-General be known.

In the case of simple offence, however, there appears to be neither authority nor statutory provision to deal with the matter of a defendant who is insane, whether properly so called as being a person suffering from a sufficient defect of reason, or disease of the mind, or a person like the defendant here. Of course, if the defendant to a charge of simple offence appears to a Magistrate to fall within the provisions of the Mental Defectives Ordinance, his case may, so to speak, be disposed of by his being dealt with under that Ordinance. However, the defendant in this case is not a mental defective as defined. The researches of counsel and my own researches have failed to find any authority either in text books or reports which helps with the problem. It is probably not a frequent occurrence because people suffering from the disabilities which the learned Stipendiary Magistrate has found afflict the defendant

are, one hopes, not very numerous and because also those assisting such a person charged with a simple offence might take it upon themselves to enter a plea of guilty under the mistaken impression that a finding of inability to plead would lead to the defendant's confinement during the Governor-General's pleasure.

What then is the learned Stipendiary Magistrate to do in this case? It is clear that the defendant is not fit to plead and should be treated as though he were insane which he is not. No authority exists for the learned Stipendiary Magistrate to order the defendant's detention to await the pleasure of the Governor-General and yet plainly, it seems to me, it would not be proper to proceed with his summary trial. I was urged by Mr. Chow for the Crown to direct the Magistrate to proceed as for a minor indictable offence and commit the defendant for trial if a prima facie case should be made out. However, I have found that this is a simple offence and I do not consider that the learned Stipendiary Magistrate should properly reach the opinion "that the charge is a ... subject for prosecution by indictment" simply because of the defendant's disabilities. It would no doubt be an easier and tidier way of disposing of the defendant I commit him for trial and on the assumption that a jury

empanelled for the purpose would find him to be unfit to plead as the learned Stipendiary Magistrate has found him to be then have this Court order him to be kept in strict custody to await the Governor-General's pleasure. A simple legislative amendment could give a Magistrate power to make such an order in cases such as the defendant's but the power does not exist at present.

After anxious consideration I have come to the conclusion that the learned Stipendiary Magistrate, having reached the conclusion he has reached as to the defendant's capacity, should simply go no further and desist from hearing the charge against him because of his unfitness. There is no other course consonant with justice for the learned Stipendiary Magistrate to adopt.

The answer to the question posed in the Special Case is therefore that to proceed in the circumstance would be contrary to law.